No. 78-1329

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA,
Petitioner,

v.

NEZ PERCE TRIBE OF IDAHO,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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This brief is filed by respondent, the Nez Perce Tribe of Idaho, in opposition to the petition of the United States for a writ of certiorari to review the interlocutory judgment of the United States Court of Claims entered in this case on October 18, 1978.

QUESTIONS PRESENTED

1. Whether the language in section 2 of the Indian Claims Commission Act, which precluded consideration of any "claim accruing after August 13, 1946", was intended by Congress to prevent the full consideration and determination of claims arising from continuing wrongful conduct by the United States that began before and continued after August 13, 1946.

2. Whether, given the special remedial purposes of the Indian Claims Commission Act and the general maxim that doubtful provisions in Indian statutes are to be construed in their favor, Indian tribes are to lose all right to determination of continuing wrong claims where:

   a) The statute involved for many years has been construed to require the litigation of those claims by the Indian Claims Commission alone and that "interpretation does not cross the literal words of the statute";[1]

   b) Filing of continuing wrong claims in the Court of Claims was effectively precluded by the Court's ruling in *Gila River*,[2] made at the behest of the United States, that the Indian Claims Commission, and not the Court of Claims, was the only appropriate forum to determine the post-1946 portion of continuing wrong claims; and

   c) Because of the statute of limitations, it is too late now to file in the other possible forum, the Court of Claims, those portions of a continuing wrong claim based upon wrongs that occurred more than six years ago.

COUNTER-STATEMENT OF THE CASE

Respondent offers the following additions and corrections to the petitioner's statement of the case:

1. In the decision below, the Court of Claims narrowly circumscribed the scope of the continuing wrong doctrine. While the Indian claimants pressed the court to restore

[1] Pet. App., at 15a.

[2] *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 135 Ct. Cl. 180 (1956), 157 Ct. Cl. 941 (1962).

the rule of *Southern Ute* v. *United States*[3] and compel a full up-to-date general accounting, the court rejected that contention in favor of the much more limited application of the continuing wrong rule which was adopted by the Indian Claims Commission after *Southern Ute*.[4] It held that jurisdiction of the Indian Claims Commission (or the Court of Claims as successor) over post-1946 claims, and the right to a post-1946 special accounting, *first* requires proof of a continuous course of wrongful conduct beginning prior to the 1946 date and extending past it, and that the jurisdiction is limited to following those demonstrated specific wrongs into the future for one year, five years, or until whenever the wrongful conduct ceased.[5]

2. The government implies in note 3, page 6, of the petition that the 1956 and 1962 decisions in *Gila River* were limited to the *Gila River* claim described in the note. In fact, the continuing wrong rule in those decisions involved five claims, including a demand for a general accounting.[6]

3. The *Navajo*, *Nez Perce* and *Gila River* cases were consolidated for consideration of their common issue, the plaintiffs' asserted right to a post-1946 accounting. Of the three cases, only *Gila River* had had a trial on the facts. In the other two cases, particularly in *Nez Perce*, the issue was argued in the abstract on motions to dismiss or for partial summary judgment.

4. A unanimous court below reaffirmed the general principle asserted in *Gila River* that the Indian Claims Commission had jurisdiction beyond August 1946 of con-

[3] 17 Ind. Cl. Comm. 28, 63, 65 (1966), *aff'd*, 191 Ct. Cl. 1, 423 F.2d 346 (1970), *rev'd on other grounds*, 402 U.S. 159 (1971).

[4] *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365, 369 (1971).

[5] Pet. App., at 27a, 28a.

[6] *See* Pet. App., at 12a n.13.

tinuing wrongs—Judge Nichols disagreed only on the issue of what constitutes continuing wrong within the meaning of *Gila River*.[7]

5. The Gila River Tribe and the Nez Perce Tribe, as well as the Navajo Tribe, relied upon that court's decisions in *Gila River* as directing them to litigate all claims arising prior to August 13, 1946, and continuing thereafter, before the Commission and putting them on notice that the court would not entertain claims based upon what was essentially an Indian Claims Commission claim.[8] The Court of Claims in the decision below pointed to

> the unfairness of now departing from a substantial position which this court adopted, many years ago, at the behest of the defendant and which has been accepted since that time by the Indian claims community as a clear signal that the Commission had jurisdiction over these "continuing" claims and that protective actions need not be filed in this court under 28 U.S.C. § 1505.[9]

[7] *See* Judge Nichols' concurrence, Pet. App., at 32a-33a.

[8] And so informed the Court of Claims in their brief.

[9] Pet. App., at 24a.

ARGUMENT

The effect of the Court of Claims' decision is limited to claims brought under the Indian Claims Commission Act. All claims under that Act were required to be filed by August 1951, and no new claims may be filed under that Act. The Commission itself has been dissolved and its remaining cases transferred to the Court of Claims. The decision is, therefore, applicable only to a dwindling number of claims and for a very limited time span into the future. No important question of federal law is posed and no issue worthy of the Court's consideration is presented.

1. The Petition relies on exaggerated and unsupported evidence outside the record.

The basic ground offered for certiorari is the asserted "enormous" expense that will be required for the government to obey the mandate of the Court of Claims "in respect of events occurring after August 13, 1946."[10] The government, of course, is entitled to advocate its point of view, and a heavy projected cost of a rule of law is a legitimate concern for the government. "The fact that a large amount of money is involved is not, however, ordinarily grounds for review by the Court."[11] Furthermore, in seeking the Court's attention the government has grossly exaggerated the economic consequences of the rule it attacks, and moreover, to buttress its argument it has (1) offered opinion evidence developed for the purpose of

[10] Pet., at 9.

[11] Stern and Gressman, *Supreme Court Practice* 289 (5th ed. 1978). *Cf. Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 n.5 (1977).

What is more appalling about this argument is that it suggests that the greater the harm suffered by reason of the government's breach of trust, the smaller should be the possibility that the government shall have to respond in damages.

its petition outside the record, involving grossly biased and unsupported statistics,[12] and (2) omitted pertinent facts.

a. Congress has considered and rejected the argument that the difficulty of providing post-1946 accounting is reason for denying the Commission jurisdiction to order such accountings. In the hearings that resulted in the 1972 extension of the Indian Claims Commission Act, the Committees of Congress were informed over and over again by government attorneys, by witnesses speaking for the Indians, and by the members of the Indian Claims Commission that the Commission was requiring the government to bring all accounting reports up to date, *i.e.*, including the post-1946 years. A representative from the Department of Justice testified to that effect, and urged that the Commission had exceeded its jurisdiction.[13] Another representative of the Department urged that the personnel available to prepare the accounting reports was insufficient to do the job.[14] With this information before it, Congress through its Committees made plain its intent that a sufficient staff of necessary personnel be assembled to provide the accounting reports ordered by the Indian Claims Commission, which, as Congress knew, would include post-1946 accounting.[15]

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[12] Pet., App. B.

[13] *Hearing on S. 2408 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. (1971) (statement of Shiro Kashiwa).

[14] *Hearing on H.R. 10390 Before the Subcomm. on Indian Affairs of House Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. (1972) (statement of Kent Frizzell).

[15] S. Rep. No. 682, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 895, 92d Cong., 2d Sess. (1972).

b. The asserted extent of the work that would have to be undertaken by the government's Indian Trust Accounting Division should the Court of Claims decision be allowed to stand, is based in part upon the unsupported opinion of the acting director of that Division, given in response to a request by government counsel[16] for "an estimate of the manpower resources that would be needed to produce an accounting report for the period September 1, 1946 to October 31, 1980". The estimate ignores the fact that the decision of the Court of Claims specifically *rejected* the Indian parties' contention that they were entitled to a general accounting, up to date, and adopted instead the Indian Claims Commission's interpretation that its authority to order the government to provide post-1946 accounting is *limited* to special accountings in aid of determining the full import of specific acts of mismanagement of Indian funds or other property committed by the government prior to August 1946, and continuing for some length of time thereafter.[17] These post-1946

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[16] Letter from Louis Cherpes to Donald Mileur (Nov. 7, 1978) (Pet. App., at 43a). The letter was prepared less than a month after the decision of the Court of Claims below and was apparently specifically designed for submission to this Court. Since the letter was presented in a manner that precluded any cross-examination of its author or authors, the precise circumstances surrounding its creation and the precise basis for the conclusions drawn can only be the subject of speculation at this time. In any event, as shown by letter of an accountant who has experience in working with the government's fiscal records, the estimate is woefully inaccurate and speculative. Resp. App. D. *See also* Brief in Opposition to Petition filed by the Navajo Tribe, App. A.

[17] *Navajo Tribe* v. *United States*, 36 Ind. Cl. Comm. 433 (1975); *Lower Sioux Tribe* v. *United States*, 36 Ind. Cl. Comm. 295 (1975); *Three Affiliated Tribes* v. *United States*, 36 Ind. Cl. Comm. 116, 130 (1975); *Gila River Pima-Maricopa Indian Community* v. *United States*, 35 Ind. Cl. Comm. 209, 214 (1974); *Northern Paiute Nation* v. *United States*; 34 Ind. Cl. Comm. 414, 417 (1974); *Blackfeet Tribe* v. *United States*, 32 Ind. Cl. Comm. 65, 75 (1973).

accountings are allowed only as the Indians can demonstrate that specific wrongs occurred prior to August 13, 1946, and that they continued past that date.[18] This certainly limits substantially the post-1946 transactions for which the government will be required to account.

The effect of the Court of Claims' interpretation of section 2 of the Indian Claims Commission Act as allowing the court to consider an award of damages for continuing wrongs is therefore extremely limited.[19]

c. The government asserts that the decision herein "may affect as many as 30 other cases." [20] The hedging words "may" and "as many as" are well-taken. If, as the government states, these 30 cases are "now awaiting initial adjudication", the government's position is most unreasonable based as it is upon the prognosis that in all 30 cases pre-1946 wrongs will be proven and that each such wrong continued past 1946, so as to trigger the government's obligation to file post-1946 special accountings thereon.[21]

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[18] *Hopi Tribe* v. *United States*, 33 Ind. Cl. Comm. 72, 80 (1974); *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365, 367 (1971).

[19] It cannot, therefore, be truthfully said that "The question . . . remains as important now as it was in 1970," when the government filed a petition for writ of certiorari in *United States* v. *Southern Ute Tribe*, No. 515, Oct. Term 1970. Pet., at 10. In 1970, the issue was presented to this Court in context of a ruling by the Indian Claims Commission, affirmed by the Court of Claims, that the Indians were entitled to post-1946 *general* accountings. *Southern Ute Tribe* v. *United States*, 17 Ind. Cl. Comm. 28 (1966), *aff'd*, 191 Ct. Cl. 1 (1970). Pursuant to that ruling, the Commission on June 10, 1970, issued an unpublished order requiring the defendant to furnish an up-to-date general accounting to the Shoshone-Bannock Tribes, plaintiff in Docket 326-C. On July 11, 1973, the Commission revoked its order in Shoshone-Bannock, having in the interim limited the rule. *Papago Tribe* v. *United States*, 26 Ind. Cl. Comm. 365 (1971).

[20] Pet., at 8.

[21] The few cases in which the Commission actually ruled on identification of specific continuing wrongs suggest the probability that some, possibly a large percentage, of the pending cases will produce rulings of no continuing wrong (as in *Yankton Sioux Tribe* v. *United States*, 37 Ind. Cl. Comm. 64 (1975)) or very limited need for further work on the part of the government's accountants, as in *Kiowa, Comanche & Apache Tribes* v. *United States*, 29 Ind. Cl. Comm. 476 (1973), where the post-1946 accounting was limited to lease income from a specific small tract of land to determine if and when the government turned that income over to the tribe. In *Gila River Pima-Maricopa Indian Community* v. *United States*, 38 Ind. Cl. Comm. 1, 7, *aff'd*, 586 F.2d 209 (1978), the continuing wrong doctrine was applied only to improperly collected operation and maintenance charges—a specific annual disbursement.

It is also unreasonable to assume that each continuing wrong will have to be litigated.[22]

2. Navajo case is *sui generis*.

Even assuming that the Court will find one or more transactions involving mismanagement of Indian funds and property by the government in all 30 cases beginning prior to August 1946 and continuing thereafter, the government's suggestion of the cost to the United States is grossly exaggerated since it is admittedly "based on the Navajo estimate".[23] The *Navajo* case is obviously not a proper guide to the scope of work in other cases or to probable costs and is *sui generis*.

It is axiomatic that the cost in time and money of accounting to various Indian tribes varies directly with the size of the estate administered by the government. That estate consists of *tribal* lands, *tribal* funds and other *tribal* assets, so that the government has more to account for on an unallotted reservation than on an allotted reservation (allotment has the effect of trans-

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[22] In the recent past, at least four accounting cases were fully disposed of by compromise settlement. Three others were settled on all issues except post-1946 accounting. It is highly probable, if past experience is a guide, that once certain legal issues are disposed of many of the cases will be settled without the need of any formal accounting. Further, tribal accountants often work closely with the government accountants, and in some cases can obtain sufficient data informally to obviate the need for any formal accounting.

[23] Pet. Brf., at 8, 46a. Even the Navajo estimate is highly suspect. *See* note 16 *supra*; *Navajo* brief, section III; and App. A.

ferring property to individual Indians, who have no claims under the Indian Claims Commission Act).

The Navajo Reservation is by far the largest of all of the Indian reservations. It is often described as being as large as West Virginia, including 14,000,000 acres of tribal trust land. On the other hand, the Nez Perce Reservation comprises 32,000 acres of tribal trust land.

Navajo income-producing assets include timber, oil and gas, vanadium, uranium, coal and helium, as well as manufacturing plants to produce wood products, cement products, a cooperative store, income from trading posts, and probably much more. That Tribe's cash balance in the Treasury in 1951 was $3,242,431. The Nez Perce have income from grazing leases and sale of timber. The Nez Perce total cash balance in the Treasury as of June 30, 1951 was $166,047.[25] Of the other accounting claimants, some are smaller in land area and income-producing assets than the Nez Perce; none remotely approaches the land holding or income-producing assets of the Navajo.

It may be assumed that the cost of accounting services necessary to permit Indian plaintiffs to identify and obtain redress for continuing wrongs will not be beyond the reasonable cost of the government's desire to do justice, while protecting itself against unfounded claims. If, as the government seems to admit, any additional sums assessed against the United States would be for well-founded claims, the scope of which is highly speculative

[24] H.R. Rep. No. 2503, 82d Cong., 2d Sess. 60, 61, 68, 69 (1952). All figures in the text and Appendix A are taken from this report, of which the Court may take judicial notice. The 1952 statistics would be particularly relevant because they show the size of the estate to which the supplemental accounting reports, completed through June 1951, would be directed.

[25] App. A.

at this time, they should not be cut off on the mere possibility that they might engender "substantial additional sums assessed against the United States."

3. The decision below is legally correct.

Defendant's jurisdictional argument was presented to the Court below. It was carefully examined and rejected by the majority and partially rejected by Judge Nichols in his concurring/dissenting opinion.[26] The majority's reasoning cannot be improved upon by counsel.[27] De-

[26] In the court below the government took the extreme position that there was *no* Indian Claims Commission jurisdiction on the basis of a "continuing wrong" (Pet. App., at 28a). In this Court defendant edges away from that stance and focuses its attack on that aspect of the decision below which declared that a continuing wrong can be established by a showing of a continuous course of wrongful policy (Pet., at 11). If in fact the government has changed its position, elemental considerations of fairness would seem to require that it specifically explain any change. If the United States still adheres to the draconian view it took below, its petition lacks the candor which one expects to find in pleadings of the United States, particularly when dealing with the claims of its Indian wards.

[27] In summary, the court below reiterated its determination in *Gila River Pima-Maricopa Indian Community* v. *United States*, 135 Ct. Cl. 180, 140 F. Supp. 776 (1956), that nothing in the Indian Claims Commission Act precludes the application of the usual rule that a court, once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes, including the awarding of all damages accruing up to the date of judgment. Pet. App., at 13a-17a. It noted that a definition of the accrual of a claim for purposes of determining when jurisdiction may attach does not rule out an interpretation that jurisdiction, once properly undertaken, may continue in order to clean up once and for all the past wrongs going far back into our history—as Congress made clear it intended. The court below distinguished continuing wrong cases wherein the effect of statutes of limitation is tempered by recognizing new "accruals" of claims that would otherwise be outlawed. Pet. App., at 15a-16a.

The court found nothing in the Indian Claims Commission Act that indicated congressional intent requires claimants before the Commission to file the post-1946 portion of their continuing wrong claims in the Court of Claims. On the contrary, the court found

fendant distorts Judge Nichols' opinion, suggesting as it does (page 11) that the judge dissented wholly from the majority's opinion and that he took the position that the court's jurisdiction is limited to post-1946 *consequences* of earlier wrongs. In concurrence with the majority, Judge Nichols stated:

> I agree to this: if the Indian tribal claimant in a Claims Commission Act proceeding, 25 U.S.C. § 70a, establishes the wrongful invasion of any Indian account in government control, before the cut-off date of August 13, 1946, it has become entitled to a proceeding in equity in which the subsequent management of the fund must be accounted for, any division of the moneys into other accounts traced, and any wrongs made good, down to the date of final adjudication, whenever that may be.[28]

As Judge Nichols' statement emphasizes, the Commission (and now the Court of Claims as successor) is exercising equity jurisdiction in the accounting cases and principles of equity may and should be applied.[29] Ad-

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many indications of tacit approval by Congress of a Commission with sufficient jurisdiction to complete litigation which it began—(1) in the provision for insuring the Indian claimants a forum whether their claims accrued before or after August 13, 1946; (2) in the provision which allowed claims to be filed as late as August 1951; and (3) in the unlikelihood that Congress would have expected the claimants to file simultaneously two sets of proceedings in order to litigate a claim which arose prior to August 1946 and continued after that time.

[28] Pet. App., at 32a.

[29] There is nothing in this court's decision in *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U.S. 638, 644 (1918), cited by petitioner, pp. 10-11, which is in conflict with the decision of the court below. The court there held that "from the time the action accrues" meant "when a suit may first be legally instituted upon it." *Cf.* the Court of Claims' definition: "when the course of conduct was first ripe enough for suit in the Commission even though all the damaging transactions or incidents would not themselves occur for some years." Pet. App., at 14a-15a. This Court in *Louisville Cement* had no reason to consider the effect on jurisdiction of continuing wrong since the impropriety which was basis for the suit had been corrected long prior to the decision. It is most reasonable to assume that if the railroad had continued to overcharge the cement company after suit was first instituted, the company would not have been required to institute a whole new proceeding before the Interstate Commerce Commission in order to be reimbursed for additional overpayments.

mittedly, the Indian plaintiffs are offered half a loaf by the court below.[30]

4. To reverse the Commission's rule at this late stage would be unfair to those tribes which relied on it.

The Indian Claims Commission Act of 1946 provided that no claim "accruing after the date of the approval of this Act [August 13, 1946] shall be considered by the Commission."[31] Claims accruing prior to that date were required to be filed by August 13, 1951.[32] Within the intervening period, tribes were to be informed of their newly won right to sue for past wrongs and to retain attorneys; attorneys were to obtain Department of the Interior-approved contracts with the tribes and investigate their claims.

We have surveyed contract attorneys for a number of tribes to determine why most attorneys did not file duplicate suits in the Court of Claims to take care of any claims that arose prior to August 13, 1946 and continued during that interim period and thereafter, particularly accounting claims.[32a]

Prior to the court's decision in *Gila River*, the attorneys, including ourselves, relying upon one or more of the following principles of law, concluded that there was no need to file new claims in the Court of Claims:

(1) The usual rule is once a court takes jurisdiction it can award damages down to the date of judgment.

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[30] Pet. App., at 27a.

[31] 25 U.S.C. § 70a (1976).

[32] 25 U.S.C. § 70k (1976).

[32a] In partial response, *see* Resp. Apps. B and C.

St. Paul Indemnity Co. v. *Cab Co.*, 303 U.S. 283, 291-92 (1938).

(2) The "accrual date" of a continuing wrong would seem to be the date it started [33] and this would be so even if for other purposes the wrong were deemed to reaccrue every year.[34]

(3) An accounting is a single cause of action which accrues when the suit is filed.[35]

(4) The Court of Claims had no jurisdiction over claims for general accountings.[36]

Furthermore, in the period 1946-1951 most tribes did not know what continuing wrongs the government may have indulged in in the management of tribal funds and property because the government accounting reports were not filed until many years thereafter.[37] The *Gila River* attorney was faced with a different set of facts. First, the continuing claims were easily discernable: water charges paid under protest before August 1946 were still being demanded and paid under protest; water was still being diverted; leases which were considered unfair were still being renewed, etc. To protect those known claims, he filed duplicate claims in the Court of Claims. However, in 1956, *at the urging of the government*, the Court of Claims held that the Indian Claims Commission was

[33] *See* Pet. App., at 27a.

[34] *Id.* at 15a, 16a.

[35] *Id.* at 27a, 32a.

[36] *United States* v. *Jones*, 131 U.S. 1 (1889). Of course it was arguable that the court did have such jurisdiction under the post-1946 jurisdictional clause of the Indian Claims Commission Act, 28 U.S.C. § 1505, but this was a doubtful proposition, and was finally rejected in *Klamath Tribe* v. *United States*, 174 Ct. Cl. 483, 490 (1966).

[37] The government did not file its first accounting in *Navajo* until 1961 (Pet. App., at 26a). The Nez Perce accounting was not filed until February of 1968. *See also* Resp. Apps. C and D.

the only appropriate forum to determine the post-1946 portion of the continuing wrong claims.[38]

Had the court ruled the other way in 1956, it is certain that most, if not all, of the tribes would have filed in the Court of Claims all known and probable claims dealing with post-1946 transactions which they had theretofore expected to be heard by the Indian Claims Commission. The Court of Claims' six-year statute would have reduced recovery, but the point is the tribes could have protected themselves for most years if the *Gila River* decision had gone the other way—and without filing multiple suits thereafter because the continuing wrong, once picked up in midstream, would have been adjudicatable to its conclusion without any new petitions having to be filed.[39]

Respondent can state from personal knowledge that after 1956 a great majority, if not all, of the 30 plaintiffs relied upon the Court of Claims decision in *Gila River* in asserting continuing claims before the Indian Claims Commission and for that reason did not file separate post-1946 claims in the United States Court of Claims.[40]

It is interesting to note, while speaking of fairness, that, although the Court of Claims came to the same conclusion for the same reasons in all three cases—*Navajo*, *Nez Perce* and *Gila River*—the government has not

[38] *Gila River, supra.*

[39] The government does not question the application of the continuing wrong doctrine to claims filed originally in the Court of Claims.

[40] Counsel for respondent, Nez Perce Tribe, is also counsel in suits for general accounting filed in the Indian Claims Commission on behalf of six other tribes. Counsel also represented the Southern Ute Tribe and obtained a decision in *United States* v. *Southern Ute Tribe*, 423 F.2d 346 (Ct. Cl. 1970), *rev'd on other grounds*, 402 U.S. 159 (1971), wherein the Court followed *Gila River*. Counsel has relied upon *Southern Ute* and *Gila River* on behalf of all those tribes. *See, in accord*, statements of attorneys for other tribes. Resp. Apps. C and D. Under the circumstances, it is particularly inappropriate and unfair to treat the Nez Perce, the Navajo and other claimants who relied upon the Court of Claims' 1956 decision in *Gila River* different from the *Gila River* claimants.

sought *certiorari* in the *Gila River* case. Ostensibly, that is because counsel for the Gila River Indians relied to their detriment upon the position taken in that case by the government which was adopted by the Court of Claims in 1956. This concession seriously undermines the government's argument that the Court of Claims had no jurisdiction to make the award. Surely, jurisdiction does not depend on reliance on the Justice Department's position. If it does, the Nez Perce Tribe claims jurisdiction on the same ground.

It is ironic that the government, which in its attempt to right all wrongs permitted even claims based upon fair and honorable dealings not recognized by any existing rule of law or equity,[41] should be asserting that Indian claimants should be precluded forever from adjudicating claims on the merits because they followed the very procedure which the government itself caused to be established in the *Gila River* case.

CONCLUSION

For the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[41] Indian Claims Commission Act of 1946, § 2(5), 25 U.S.C. § 70a (1976).

Appendices

APPENDIX A

MATERIAL, LAWS AND TREATIES AFFECTING INDIANS

VII. NAVAJO FUNDS AND ASSETS [p. 471]

Tribal funds

		Interest rate	Balance as of June 30, 1951
	NAVAJO AGENCY NAVAJO		
14X7341	Proceeds of Labor, Navajo Indians, Arizona and New Mexico, May 17, 1926, 44 Stat., 560	4	$3,077,906.29
14X7841	Interest and Accruals on Interest, Proceeds of Labor, Navajo Indians, Arizona and New Mexico, June 13, 1930, 46 Stat., 584		161,013.77
14X7144	Revolving Fund, Dental Work, Navajo Indians, Arizona and New Mexico, May 9, 1938, 52 Stat., 312-313	4	3,096.30
14X7492	Proceeds of Mining Leases, Navajo Indians, Arizona and New Mexico, April 17, 1926, 44 Stat., 300		140.00
14X7644	Interest and Accruals on Interest, Revolving Fund, Dental Work, Navajo Indians, Arizona and New Mexico, June 13, 1930, 46 Stat., 584		275.03
	Navajo Agency total		3,242,431.39

Income producing assets

Navajo Agency, Navajo Tribe:

Income from rented trading posts. The Pine Springs Trading Post, Houck, Ariz., was acquired by the tribe in 1934 and is rented to an individual for $350 a year. Dilkon Trading Post, Winslow, Ariz., was acquired by the tribe in 1942 and is rented to an individual for $1,000 a year. The Pinon Trading Post, Pinon, Ariz., was acquired by the tribe in 1942 and is rented to an association

comprising 12 members for $300 a year. The value of the Pine Springs Trading Post was estimated by the chief, Branch of Economic Development, at $15,000; Dilkon Trading Post, $10,000; and Pinon Trading Post, $2,500 — $27,500.00

Wide Ruins Trading Post (Mercantile center). Acquired by the tribe in August 1950 for $60,233.72, using part of the $79,000 borrowed from the tribal revolving credit fund. To June 30, 1951, the enterprise earned a net profit of $2,096.59. Net assets as of June 30, 1951, were $87,959.93, including merchandise inventory of $18,470.80. Cash in the amount of $1,952.35 is reflected in a separate section of this report $86,007.57

[p. 472]

Navajo Arts and Crafts Guild was established in 1941, with $15,000 borrowed from the United States under reimbursable agreements. In February 1951, the guild was reorganized and obtained a $10,000 loan under the tribal revolving credit fund, a $5,000 tribal grant and a $5,000 Government grant. The guild occupies buildings at the Navajo Tribal Fairgrounds which were transferred to the tribe in 1949 by the Government at the appraised value of $4,199. These buildings were repaired and remodeled by the guild at a cost of $5,011.40 and are presently valued at $15,000, according to the chief, Branch of Economic Development. During the fiscal year 1952, the guild operated at a loss of $3,307.19; however, in the last quarter of the fiscal year a net profit of $1,274.10 was realized. Net assets as of June 30, 1951, were $38,305.87, including inventories of $8,373.65. Cash of $10,968.31 is reflected in a separate section of this report.. 27,337.56

Cement products industry enterprise was authorized in February 1951, to construct and operate a plant for the manufacture of cement building blocks. In June 1951, a modified plan provided also for the operation of a sand and gravel pit and the manufacture of crushed rock. The enterprise was financed with a tribal loan of $96,000 and a Government grant of $4,000. As of June 30, 1951, construction was completed but the plant was not in production status. As of the same date, net assets were

$124,372.31, including fixed assets of $48,551.71. Cash in the amount of $75,435.10 is reflected in a separate section of this report.. 48,937.21

Sawmill Mercantile Center, a tribal enterprise, was acquired in August 1950, from an individual at a cost of $33,410 using part of $48,410 borrowed from the tribal revolving credit fund. Net profit to June 30, 1951, was $15,223.70. Net assets as of June 30, 1951, were $75,237.08, including merchandise inventory of $14,646.91. Cash in the amount of $26,302.74 is reflected in a separate section of this report 48,934.34

Ram Herd and Ram Pasture enterprise superseded that which was known as the Navajo Tribal Livestock Improvement Project (sheep improvement section) which was established in 1937 and financed by a reimbursable loan of $12,000. In June 1951, the enterprise borrowed $9,000 from the tribal loan fund, and both loans are to be liquidated under the provisions of the new plan of operation. Net assets as of June 30, 1951, were $49,929.94, including 396 rams valued at $9,000 and 5,900 pounds of wool valued at $2,600. Cash of $29,915.94 is reflected in a separate section of this report 20,014.00

Wood products industry enterprise was established in February 1951, to manufacture house and office furniture on the open market and to recondition used furniture. The enterprise borrowed $23,000 from the tribal loan fund and received a $4,000 Government grant. These funds were used to purchase, repair and remodel buildings and equipment of a privately owned trading post, purchase machinery, and for operating expenses. As of June 30, 1951, remodeling, including rental cabins, and installation of equipment, was completed and Navajo Indians were being trained for production. Orders in excess of $43,000 were on hand. Net assets as of June 30, 1951, were $28,006.14, including lumber inventory of $2,500. Cash of $2,455.07 is reflected in a separate section of this report $25,551.07

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Navajo Wingate Village Housing Project was transferred to the Navajo tribe in December

1949, by the Public Housing Administration, without cost, pursuant to the provisions of the Independent Offices Appropriation Act of 1950. The tribe made repairs and improvements during 1950 in the amount of $22,388, such amount being transferred to the tribal loan fund to which repayments will be made by the enterprise. The enterprise also received a Government grant of $1,000. The project furnishes housing facilities to employees of Fort Wingate Ordnance Depot, preference being given Navajo Indians, and consists of 57 two-bedroom units renting at $18 a month; 33 one-bedroom units renting at $15 a month; and 36 light housekeeping units renting at $12 a month. Net profits to February 28, 1951, were $6,705.43. Net assets as of the same date were $131,287.66, including buildings appraised at $104,975 ..... 131,287.66

Navajo tribal sawmill has been operated as a tribal enterprise since 1936. The mill employs an average of 275 Navajo Indians and produces approximately 14 million board feet of lumber a year. The sawmill is the largest tribal income producing enterprise. In October 1950, the enterprise loaned the tribe $500,000 which was used to finance the 1951 tribal budget in lieu of requesting tribal funds in the U.S. Treasury, drawing interest of 4 percent per annum. An additional $250,000 was loaned the tribe by the enterprise in July 1951, for the establishment of a tribal well drilling program. Net profits for the fiscal year 1951 were estimated to be $280,000. The financial records for the fiscal year 1951 had not been audited; however, according to figures furnished by the sawmill accountant, and records of the Indian Service Special Disbursing Agent, total assets of the enterprise as of June 30, 1951, were $2,528,018.37, including lumber and logs valued at $222,175.30 (lumber $183,175.30 and logs $39,000). Cash of $509,324.88 is reflected in a separate section of this report 2,018,693.49

Sheep Dipping Enterprise was established by the tribe in 1921, according to the extension agent's records. Net assets as of June 30, 1951, were estimated at $63,321.23, including 65

[p. 474]

dipping vats valued at $52,000. Cash of $5,837.79 is reflected in a separate section of this report 57,483.44

Many Farms Cooperative Store (Navajo Cooperative Association), a trading post activity, was established and financed by individual tribal members in 1941. As of June 30, 1951, there were 11 individual members; however, in August 1951, the tribe purchased shares of 3 individuals and it is anticipated that in the near future the tribe will acquire full ownership. Net profit from September 17, 1949 to May 10, 1951, was $910.09. Net assets as of May 10, 1951, were $41,119.96, including merchandise inventory of $10,171.96 and buildings valued at $20,000 which are owned by the tribe and occupied by the association rent free 41,119.96

Red Lake Cooperative Association (a trading post activity) was organized and financed by individual tribal members in May 1942. As of June 30, 1951, there were 28 members. Net assets as of September 6, 1951, were $33,516.10, including inventories of $15,690.27.... $33,516.10

Pinon Cooperative Association (a trading post activity) was organized and financed by individual tribal members in 1942. As of June 30, 1951, there were 12 members. In 1948, a branch store was established. No financial statements were available; however, as of June 30, 1951, the net assets were established by the manager to be $40,405.15, including inventories of $22,100. Cash of $4,005.15 is shown in a separate section of this report 36,400.00

In addition to the above enterprises, the tribe authorized on June 13, 1951, certain enterprises which have been financed through tribal loans and Government grants. There was no activity as of June 30, 1951, and all assets, which consist of cash, are reported under tribal organization funds. The enterprises and the amount of loans and grants are as follows:

Enterprise	*Tribal loan*	*Government grant*	
Clay Products Industry Enterprise	$6,000	$4,000	
Leather Products Industry Enterprise	6,000	4,000	
Native Materials Industry Enterprise	3,000	2,000	
Wool Textile Industry Enterprise	10,000	10,000	
Note.—Government grants referred to hereinbefore are those funds authorized by the Act of April 19, 1950 (25 U.S.C. 631-640, Supplement IV).			
Navajo Agency total			2,602,782.40
Oil and gas leases: During the fiscal year 1951, tribal income realized from bonuses from sales of leases, rentals and royalties was $1,245,279.92. Total income since first production in 1923 has been $4,992,586.28			1,245,279.92
Vanadium—Uranium leases. During the fiscal year 1951, tribal income from production royalties and lease rentals amounted to $151,204.65. Total income since first sales in 1942 has been $321,504.60			151,204.65
Navajo Agency total			1,396,484.57
Alamo Navajo Cooperative Store, a community enterprise financed by members of the community in 1940 as a nonprofit organization. Assets of the store total $12,634.99 as at July 9, 1951, including inventories of $4,220.39. Cash of $4,105.85 and securities of $4,810 are reflected in separate sections of this report			4,719.14
Tribe total			4,719.14

VIII. Nez Perce Funds [p. 480]

	Tribal Funds	Interest rate	Balance as of June 30, 1951
	Nez Percé		
14X7462	Proceeds of Labor, Nez Percé Indians, Idaho, May 17, 1926, 44 Stat., 560	4	$148,038.28
14X7962	Interest and Accruals on Interest, Proceeds of Labor, Nez Percé Indians, Idaho, June 13, 1930, 46 Stat., 584		12,431.47
14X7063	Nez Percé of Idaho Fund, August 15, 1894, 28 Stat., 331	5	2,193.33
14X7563	Interest and Accruals on Interest, Nez Percé of Idaho Fund, August 15, 1894, 28 Stat., 331		3,384.10
	Tribe total		166,047.18

APPENDIX B

LAW OFFICES

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April 6, 1979

Angelo A. Iadarola, Esquire
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Re: *United States* v. *Navajo Tribe* and *United States* v. *Nez Perce Tribe*, both in the Supreme Court of the United States

Dear Angelo:

I write this letter as a contract attorney in the 10 general accounting cases identified below:

	Docket No.	Tribe
1.	19	Minnesota Chippewa
2.	188	Minnesota Chippewa
3.	189A	Minnesota Chippewa (Red Lake)
4.	189C	Minnesota Chippewa (Red Lake)
5.	115	Crow Creek
6.	116	Lower Brule
7.	118	Rosebud
8.	119	Standing Rock
9.	363	Lower Sioux
10.	226	Caddo

You have asked that I focus on the effect of the Court of Claims decision in *Navajo* and *Nez Perce* on the ten listed cases with respect to wrongs that occurred after

August 13, 1946, but had their roots in the period prior to that date.

Two points are important. First, after the Court decided the *Gila River Pima-Maricopa* case in 1956 (135 Ct. Cl. 180), we absolutely relied on that decision as protecting our "continuing wrong" claims, if any. Prior to the 1956 opinion, we did not file general accounting cases in the Court of Claims because the Court has no jurisdiction over such claims, only over claims for explicit wrongs. We could not file for explicit wrongs because the Government did not furnish us with the accounting reports revealing its handling of tribal moneys until years after the Gila River decision in 1956. Once that decision was on the books we relied on it and did not file.

The second point is that in their present posture the ten listed cases do not involve much with respect to continuing claims. As you know, where a tribe has small assets there is no room for significant recoveries. Tribal property was substantially extinguished during the period 1889-1913 by conversion to individual Indian allotments and disposition to homesteaders and others. In the first eight cases listed, the claims prior to July 1, 1926 are barred. The Commission held four by res judicata (Items 1-4) and four because the complaint was limited to the post July 1, 1926 period. Necessarily small amounts are involved *in toto* and any "continuing claims" reflect a small portion of the whole.

Sioux—Docket No. 363. (Item 9) The major claims relate to the period ending in 1896. The claims that might be defined as "continuing" are very small, since the bands owned virtually no land and had no income that the Government could mismanage on a continuing basis.

Docket No. 226—Caddo. (Item 10) The *Caddo* case has practically nothing in dollar amounts. The Caddo have had no reservation for 70 years. There is no "continuing claim" of which we are aware.

Kind personal regards,

Sincerely,

/s/ Marvin J. Sonosky
MARVIN J. SONOSKY

MJS/ibc

APPENDIX C

LAW OFFICES

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April 9, 1979

Angelo A. Iadarola, Esq.
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Re: Petition For A Writ Of Certiorari To The United States Court of Claims, United States v. Navajo Tribe; United States v. Nez Perce Tribe of Idaho, No. 78-1329

Dear Angelo:

This firm serves as counsel for the plaintiff tribes in six pending cases, filed with the Indian Claims Commission prior to August 13, 1951, which presented claims for a general accounting. The following is a list of the six cases and states the date of the initial accounting report that was prepared by the Government in each case in response to the suit:

Docket No.	Tribes	Date of Initial Government Accounting Report
22-G	Mescalero Apaches	June 18, 1969
22-H	San Carlos Apaches White Mountain Apaches	November 6, 1970
87-A	Northern Paiutes	April 25, 1963
178-A	Colville Confederated Tribes	July 26, 1966
184	Fort Peck Indians	January 26, 1960
283-B	Colorado River Indian Tribes	May 31, 1961

In each of these cases, the Government accounted in its initial report for receipts and disbursements of tribal trust funds through June 30, 1951, and in each of these cases, the report disclosed acts of mismanagement by the Government of tribal funds which were committed prior to August 13, 1946 and continued after that date.

Following the receipt of the initial accounting reports, we took steps in the pending cases to require the Government to furnish supplemental accounting reports relative to its post-June 30, 1951 management of the funds for purpose of ascertaining whether the earlier wrongful acts continued after June 30, 1951. Relying on the decisions of the Court of Claims in the *Gila River* case (135 Ct. Cl. 186; 157 Ct. Cl. 941), we considered that the Commission had jurisdiction of the continuing wrongs and that there was no need—and that it would be contrary to the decisions—to institute duplicate suits in the Court of Claims relative to the continuing wrongs.

Sincerely,

WEISSBRODT & WEISSBRODT

By /s/ I. S. Weissbrodt
I. S. WEISSBRODT

APPENDIX D

ROSS, LANGAN & McKENDREE
Certified Public Accountants
1311A Dolley Madison Boulevard
McLean, Virginia 22101
(703) 893-2660

April 11, 1979

Angelo A. Iadarola, Esquire
Wilkinson, Cragun & Barker
1735 New York Avenue, N.W.
Washington, D.C. 20006

Re: Nez Perce, Docket 179-A

Dear Mr. Iadarola:

At your request, we have studied the letter of November 7, 1978, addressed to Mr. A. Donald Mileur by Louis P. Cherpes, which letter was incorporated as an appendix in the government's petition for writ of certiorari in *United States* v. *Navajo* and *United States* v. *Nez Perce Tribe.*

As Certified Public Accountant's (CPA's) working for a number of Indian tribes, we have audited and analyzed tribal accounting reports prepared by the General Services Administration Indian Trust Accounting Division and have performed independent research on tribal financial records in the United States Archives and elsewhere. In our work we have dealt with the government's fiscal management in both the pre-1946 period and the post-1946 period, up to 1974. On the basis of our knowledge of the nature of government records, procedures followed by the Indian Trust Division, and of modern accounting methods, it is our opinion that the estimate of 4 million hours (i.e. 2,000 man years) to prepare post-1946 accounting reports for some 30 Indian accounting claims is far in excess of the time which should be required to do the job. In addition, we take exception to Mr. Cherpes

estimate of $50 million to locate documents and prepare essentially correct accounting reports of the 30 Indian accounting claims.

Before explaining the basis of our opinion that the 4 million hours and $50 million is excessive, we believe it is important to distinguish between accounting and auditing.

An accounting is generally defined as the classifying, recording and summarizing of financial transactions and of interpreting their effects on the affairs and activities of an economic unit. Accounting itself has not changed materially in recent years, but the means—manually by a bookkeeper versus automatically by a computer—has undergone substantial advances. An audit on the other hand is concerned mainly with the verification of accounting records. Auditing procedures, which stress correctness, veracity and propriety of accounting records, are generally performed either by experts known as CPA's or government auditors whose education, training and experience provides the necessary expertise.

Indian accounting claims in our experience involve much more of an accounting function than an audit function as described above, although after completion of the accounting, auditing techniques are sometimes called for to verify the accounting records and transactions.

While we grant that finding the records may be a task, based on our experience we believe that it is generous to assume that it would take 19 accountants, historians and related personnel working no more than one year to find the records for 30 tribes. Once records are located, we believe the appropriate method to do the job would be to utilize a computer in the following steps:

First, accountants must manually examine each document, and classify and code the transaction in sufficient detail for keypunching. In our calculation of cost and required hours below, we used only 20 transactions per

hour to account for the few problem transactions which may take additional time to examine. In our experience in Indian Accounting cases, 20 per hour is on the low side; a good accountant should be able to do as much as 35 to 40 per hour.

Second, the coded transaction should be keypunched and keyverified to make ready for computer processing. In our calculations below, we estimate that a keypunch operator can type 1,600 transactions a day. This is about 80 percent of a normal daily standard for a good keypunch operator. Our calculation also includes a unit cost of twenty cents a transaction which is on the high side.

Third, the data as keypunched can now be processed on a computer. Our calculations below include not only processing costs, but supervision and programming cost to provide for proper printing and report format as output from the computer.

As a note for the record, the post-1946 disbursement documents mentioned by Mr. Cherpes as factor 4 in arriving at his estimates were randomly batched without regard to tribe. Use of the computer can facilitate the processing of the documents because while the steps performed in one and two above can be completed in a fairly random sequence, the computer can separate the data by tribal claims if the accountant assigns the proper tribe code in step one. We know that computer accounting methods are available to the government accountants. In at least one case in which we are employed, the Indian Trust Division is taking advantage of computers to lessen the complexity of an accounting involving a large number of transactions.

The fourth and final step involves an accountant's review and reconciliation of each report. We assumed that the accounting would require review of approximately 1,000 annual reports (33 years times 30 tribal claims). We

have assumed that all financial transactions in each of the 33 years for each of the 30 tribes would be included in the accounting. For our calculations, we have assumed 4,000,000 transactions for all tribes during those years. We have been advised that the actual claims will not cover all transactions nor all years. Therefore, our estimates are conservative.

In summary, our best estimate of the cost to provide a proper accounting for 30 claims covering 33 years, would be about $185,000 per claim, or $5.6 million for all 30 tribal claims. The average personnel hours for each claim we estimate to be 12,600, or a total of 376,000 hours for all cases. Assuming 2,000 hours worked each year, then the total 376,000 hours represents the equivalent of 188 man years, i.e. 188 accountants, keypunch operators, supervisors and computer personnel working one year on the case. This includes the personnel searching for documents for one year.

We believe that our estimates are reasonable, and are willing to provide the details used in arriving at our estimates.

Sincerely,

ROSS, LANGAN & MCKENDREE

/s/ Thomas P. Langan
THOMAS P. LANGAN
Partner
Certified Public Accountant

TPL/hk

April 11, 1979